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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1344

PETER SAMUEL VRINER,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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The respondent, People of the State of Illinois, respectfully prays that a Writ of Certiorari to review the judgment and opinion of the Supreme Court of Illinois, entered on December 4, 1978, be denied.

I.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a conflict of interests exists where an alternative defense theory might have been more successful than the one employed at trial.

2. Whether the Supreme Court of Illinois correctly distinguished *Holloway* v. *Arkansas* from the case at bar.

3. Whether this Court should review petitioner's allegation that in a post-trial motion he objected to joinder where that issue was not raised in his brief in the Supreme Court of Illinois.

II.

STATEMENT OF THE CASE

Petitioner Peter Vriner was tried and convicted by a jury in the Circuit Court of Champaign County on the following charges which were brought by indictment: (1) armed violence based upon aggravated assault; (2) armed violence based upon intimidation; (3) unlawful use of weapons. The court sentenced petitioner to one to three years on each armed violence count and to 364 days for the charge of unlawful use of weapons; the sentences to run concurrently.

On petitioner's appeal to the Appellate Court of Illinois, Fourth District, the State conceded that the conviction for armed violence based on aggravated assault should be vacated because it was based on the lesser included offense of unlawful use of weapons. The Appellate Court, finding that the case presented no substantial question and that an opinion would have no precedential value, disposed of the case pursuant to Illinois Supreme Court Rule 23. In its order the court vacated the conviction of armed violence based on aggravated assault and affirmed the convictions of armed violence based on intimidation and unlawful use of weapons. The petitioner appealed to the Supreme Court of Illinois and that court affirmed the convictions. *People* v. *Vriner,* 385 N.E. 2d 671 (1978).

At the trial petitioner and his brother William Vriner were represented by the same attorney, Mr. Robert P. Moore. A third co-defendant, Stanley Vinson, was represented by Mr. Paul Vallandigham. Prior to the commencement of the trial a hearing was had on the State's motion to consolidate for trial the cases against Peter Vriner and

Stanley Vinson. (R. C. 56-57) The objection by Vinson's attorney to the consolidation was very specific; he stated that he wanted to call each of the Vriners to testify on behalf of his client but had no assurance that the Vriners would take the stand in a consolidated trial. (R. 14) The court overruled his objection. Peter Vriner's attorney, too, objected to the consolidation, whereupon the following colloquy was heard (R. 3-4):

> MR. MOORE: I do you Honor. Because I have been sick all this time I haven't completely investigated this matter. We might have some diametrically opposed defenses. But that's the only thing I can say at the present time.
>
> THE COURT: They might have, but you don't know at this time, is that correct?
>
> MR. MOORE. That's correct.
>
> THE COURT: Are there any statements or confessions, or anything of that kind being used in these two cases, made by one that incriminates somebody else?
>
> MR. DELAMAR: (the prosecutor) No statements by the defendants that we are aware of.
>
> THE COURT: Anything you want to say about this, Mr. Moore?
>
> MR. MOORE: No, your Honor.

The objection was overruled.

About two weeks later, but still prior to trial, the State moved to join the case against William Vriner with the two previously consolidated cases. The record contains the motion itself, but discloses no court proceedings regarding the motion. Thus, there is no record of an objection to the joinder of William Vriner with Peter Vriner and Vinson.

During the trial two witnesses identified petitioner Peter Vriner as the person who wielded a pistol on May 4, 1976

in a disturbance on the parking lot at Herb's Market in Champaign. The first to identify him was the victim Michael Rea. (R. 39) Rea described the gun as a small chrome-plated automatic. He testified that the defendant, while holding the gun, ordered him to get out of the parking lot. Rea then put his car in gear and as he was moving toward the exit a shot was fired. He did not see the petitioner fire the shot. (R. 36)

Lenford Russell did see Peter Vriner fire the pistol as Michael Rea left the lot. (R. 69) Mr. Russell's recollection of the incident was detailed and complete, even to the description of defendant's pistol as a nickel-plated automatic. (R. 65) He stated that the lighting on the parking lot was very good, including two or three overhead lights and the light from the store front which was entirely lit up. (R. 68) Russell estimated that he was about 35 feet from the green Chevrolet from which petitioner emerged (R. 63), he reported the car's complete license number to the police except for one digit (testimony of Officer Anding R. 123). Mr. Russell, who was not a party to the altercation, testified that he had known the petitioner and his brother for several years, having been a patron of their father's confectionary up to the present. (R. 70-72)

Officers Thomas Anding and William Jobe responded immediately to the disturbance call at Herb's Market. Anding described the lighting conditions at the scene upon his arrival as "fairly well lit", including one high pole, a large light, two beer signs, several fluorescent lights underneath the awning, and lighting from inside the store. (R. 127-128) Jobe testified that at the edge of the entrance to the parking lot, about five feet from the road, he found an expended shell casing from a .25 caliber automatic. (R. 131-132)

John Ruedi, a civilian, and Officer Norman Meeker testified to the facts surrounding the arrest of petitioner and the recovery of his pistol less than an hour after the Herb's Market incident.

At approximately 9:15 P.M. Ruedi pulled his blue 1966 Ford into the Stewart service station lot on North Neil Street in Champaign. (R. 94) Shortly afterward a green Chevrolet pulled into the lot, stopping 10 to 15 feet from his car. (R. 97) No more than 30 seconds later a police car arrived (R. 99); at that point the driver of the Chevrolet got out and flipped a gun underneath his (Ruedi's) car before going inside the service station. (R. 98) Ruedi positively identified Peter Vriner as the man who threw the gun underneath his car. (R. 101)

Officer Meeker, who was driving a Champaign P.D. patrol car, followed the green Chevrolet into the Stewart service station lot. He was quickly assisted by other officers who covered the suspects. (R. 113) Meeker saw one of the suspects standing in the back of the station using a telephone and arrested him (R. 114); he identified Peter Vriner as that suspect. (R. 117-118) Underneath a blue Ford, Officer Meeker recovered a chrome-plated, pearl handle, .25 caliber automatic. (R. 114-115) Meeker testified that the clip of the automatic is designed to hold seven rounds, yet when he found the weapon on the lot there were five rounds in the clip and one in the chamber. (R. 116) William Vriner and Stanley Vinson were arrested at the service station along with petitioner.

At the close of the People's case the court directed a verdict in favor of petitioner's brother William. (R. 151) Petitioner then took the stand and claimed his brother had fired the shot at Herb's Market (R. 155) and denied that he had thrown a gun underneath a car at the service station (R. 158); thus contradicting three state's witnesses testifying about two separate events.

William Vriner, who was no longer a party, testified concerning the incident at Herb's Market. He said that when he and Peter got out of the Chevrolet Michael Rea reached toward the seat of his car. William, thinking that Rea was going for a weapon, then took the pistol out of his pocket and pointed it down. (R. 178) He saw Rea drive around the corner and immediately return, at which time he (William) fired a shot in the ground. (R. 179) This, of course, contradicts the testimony of Rea and Russell that the shot was fired just as Rea left the lot. William also swore that it was he who slid the pistol underneath another car at the Stewart station. (R. 11)

The jury found the petitioner guilty of unlawful use of weapons and two counts of armed violence, one based on intimidation and one on aggravated assault. The court sentenced petitioner to a term of 364 days for unlawful use of weapons, to run concurrently with terms of one to three years on each of the armed violence convictions.

III.

REASONS FOR DENYING THE WRIT

A.

A CONFLICT OF INTERESTS DOES NOT EXIST SIMPLY BECAUSE AN ALTERNATIVE DEFENSE THEORY MIGHT HAVE BEEN MORE SUCCESSFUL THAN THE ONE EMPLOYED AT TRIAL.

Petitioner and his brother William were represented by the same attorney at trial. William was acquitted by the trial court at the close of the State's evidence; petitioner was found guilty by the jury on all counts. Petitioner now alleges that there was a conflict of interests between his brother and himself which could have been cured only by appointment of separate counsel.

Joint representation by the same counsel is not a conflict of interest where, as in the present case, the State seeks to hold one defendant guilty as the principal and the other guilty on a theory of accountability. Petitioner now asserts that: "Prior to trial, counsel must have known that, according to William and Peter, it was William and not Peter who had been the driver and shot the gun." (Pet. 7) This statement is speculative on its face and the Supreme Court of Illinois searched the record without finding anything to substantiate its truth. The record is devoid of any such evidence nor does the record reflect an attempt on the part of petitioner's trial counsel to inform the court prior to trial of an actual or potential conflict. This failure to attempt to make a conflict known to the trial court takes this case out of the ambit of *Holloway* v. *Arkansas,* 435 U.S. 475 (1978), and renders *Holloway* irrelevant to the case at bar.

There is nothing in the record prior to the trial or during the presentation of the State's evidence that pointed to one of the brothers being responsible for the offenses to the exclusion of the other. This defense stratagem arose only after William had been acquitted, and then it was played for all it was worth. William not only claimed that he had flourished the pistol and shot it after Rea (R. 178-179), but also that he had tossed the pistol under Ruedi's car when the police arrived at the service station (R. 181).

We cannot know for certain what defense the brothers' counsel planned before William won his directed verdict. Their attorney's four-sentence opening statement (R. 26-27; quoted in full at Pet. 9) does not offer a clue. There is a very real possibility, however, that the defense was not to be one of misidentification (it was fairly certain that someone in the car from which the brothers emerged had threatened Rea and that the brothers at least aided and abetted), but one of provocation on the part of the victim Rea. For example, petitioner's counsel in his cross-examination of Rea was apparently trying to establish that Rea had been fired from his job as a security officer because of misconduct. (R. 42-43) He also attempted to show that Rea had called one or both of the brothers a son-of-a-bitch (R. 44) and that Rea had tried to reach a weapon in his car (R. 47-48). And petitioner's contention that trial counsel could not fulfill his duty to petitioner by cross-examining occurrence witnesses as to the possibility that William was the person with the gun is belied by the record of his cross-examination of Rea (R. 46-47) and Russell (R. 92).

Admittedly, it is somewhat speculative to suggest that from the start of the trial until the close of the State's evidence the Vriners' intended defense was to be one of provocation and reaction to a presumed threat. But it is even

more speculative to contend, as petitioner does, that the brothers had conflicting defenses *ab initio*. If this is true, why did not their attorney inform the court of the conflict when the State moved to consolidate the brothers' cases? Will this Court speculate that their trial counsel was acting without the information and consent of his clients when he failed to reveal the alleged conflict to the court? Is it not more plausible that the brothers wanted to be tried together, that they each had intended to reinforce, to support the testimony of the other, that Rea first verbally assaulted them, and then reached for what they presumed was a weapon?

This is precisely the type situation that Justice Frankfurter was referring to in his dissenting opinion in *Glasser* v. *United States*, 315 U.S. 60, 92 (1942), when he observed:

> There are advantages and disadvantages in having separate counsel for each defendant or a single counsel for more than one. Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack.

The fact that in this case the disadvantages of joint representation may have outweighed the advantages does not, in view of the paucity of the record, merit review by this Court.

B.

THE SUPREME COURT OF ILLINOIS CORRECTLY DISTINGUISHED *HOLLOWAY v. ARKANSAS* FROM THE CASE AT BAR.

The Supreme Court of Illinois extensively discussed *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), and correctly applied the *Holloway* mandate. In *People* v. *Vriner*, 385 N.E. 2d 671, 674 (1978), the court said:

> In *Holloway*, where, as here, defendants' cases were consolidated, the attorney appointed for the codefendants made pretrial motions for separate counsel. He represented that, because of confidential information received from the codefendants, he was confronted with with the probable risk of a conflict of interests that would preclude him from providing each of the clients effective assistance. The trial court denied the motion. Subsequently both defendants were convicted. The Supreme Court reversed, holding that, in the face of the representations made by the attorney, the court should have either appointed separate counsel or taken adequate steps to ascertain whether the risk of conflict was too remote to warrant separate counsel; that, by failing to do so, the court deprived defendants of the guarantee of effective assistance of counsel. In addition to requests for separate counsel, the rule in *Holloway* presumably would extend to requests for separate trials, because in certain cases the conflict may be alleviated by trying the defendants separately.

The court then distinguished the case at bar as follows:

> The only possible basis for the application of the holding in *Holloway* would be the joinder of the case against William with those against Peter and Vinson over an objection based upon a potential conflict in representing both of the Vriner brothers. Inasmuch as any conflict-based objection to this joinder is not a part of the record before us, we are precluded from applying the *Holloway* rule to determine that Peter was denied the right to effective assistance of counsel because of a conflict of interests. *Id.* at 675.

Next the court examined the question of whether, aside from the *Holloway*-type situation, a conflict of interests existed so as to deny petitioner the effective assistance of counsel. In doing so the court acknowledged that: "... once the court finds a conflict of interests, it is unnecessary to establish actual prejudice to the defendant, as prejudice is

presumed." *Id.* at 675; citing *Holloway, Glasser,* and a line of Illinois cases. However, the court could find no conflict of interests. It then pointed out the only way a defendant could prevail under these circumstances, and these are the words which petitioner ripped from their context and inserted in bold type as his point B.:

> Thus to prevail on a claim of ineffective assistance of counsel because of representation of criminal co-defendants by a single attorney, a defendant must show an "actual conflict of interest manifested at trial." *Id.* at 676.

Surely this is a correct statement of the law. To hold otherwise would be to permit a defendant whose counsel has a possible conflict to withhold this information from the court, to go to trial and take a chance of winning an acquittal and then, failing to do so, to claim a conflict after the trial and being able to win a new trial with no showing of how the putative conflict of interests prejudiced him during the trial. It would be a simple case of a defendant getting two bites at the same apple. Unfortunately for this petitioner, the Constitution only guarantees him one fair trial.

C.

PETITIONER'S ALLEGATION THAT IN A POST-TRIAL MOTION HE OBJECTED TO JOINDER WAS NOT RAISED IN HIS BRIEF IN THE SUPREME COURT OF ILLINOIS.

Petitioner argues that his trial counsel's post-trial assertion that he objected to the joinder of the cases of his clients Peter and William Vriner in a consolidated trial was undisputed by the prosecutor. Respondent cannot say whether it was undisputed at the time it was raised because

he does not have the record before him. One thing is certain, however, and that is that petitioner never raised the issue before the Supreme Court of Illinois. This is supported by the language found in the Illinois Supreme Court's opinion, *People* v. *Vriner,* 385 N.E. 2d 671, 675 (1978):

> Thus, there is no record of an objection to the joinder of William with Peter Vriner and Vinson. In his post-trial motion, however, defendant's counsel claimed that he had objected to consolidating for trial the cases against William and Peter . . . The only possible basis for the application of the holding in *Holloway* would be the joinder of the case against William with those against Peter and Vinson over an objection based upon a potential conflict in representing both of the Vriner brothers. Inasmuch as any conflict-based objection to this joinder is not a part of the record before us, we are precluded from applying the *Holloway* rule to determine that Peter was denied the right to effective assistance of counsel because of a conflict of interests.

While the Supreme Court of Illinois in perusing the record found the petitioner's post-trial motion claiming objection to the consolidation, this post-trial motion was not once alluded to in the petitioner's brief or in oral argument. Therefore, petitioner is precluded from raising the matter in his petition to this Court. However, if petitioner's allegations are true, he is not without a remedy. He can still seek review of the matter in a post-conviction petition in the trial court. Ill. Rev. Stat., 1977, Ch. 38, art. 122. At that time the prosecution will have an opportunity to admit or deny petitioner's post-trial allegation.

Respondent takes issue with petitioner's claim that: "The Illinois Supreme Court recognized that if there had been an objection to joint representation, or to consolidation, under *Holloway*, the facts would require reversal." (Pet. 14) What the court in fact said was this:

> For us now to say that the presentation of the defense in this case demonstrated that an impermissible conflict of interests existed from the outset of the trial would be tantamount to adoption of a per se rule which, absent a knowing waiver, would require separate representation of criminal codefendants in every case. Before we arrive at the point of reviewing a conviction without requiring a showing of prejudice to the defendant, a positive basis must be found for concluding that an actual conflict of interests existed. We hold that an insufficient basis exists in this case for finding that there existed a conflict of interests which denied defendant the effective assistance of counsel. *Vriner*, 676.

Respondent submits that these words cannot be honestly mistaken for a recognition "that if there had been an objection to joint representation, or to consolidation, under *Holloway*. the facts would require reversal."

IV.

CONCLUSION

For the foregoing reasons, People of the State of Illinois, Respondent, respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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